Supreme Court, U.S.
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No. 80-549

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

JACKMAN & COMPANY, DAVID H. JACKMAN, NATIONAL DREDGING, INC., ROYAL BOSKALIS WESTMINSTER N.V., STUYVESANT DREDGING, INC., UNITED STATES CORPORATION COMPANY, UNITED STATES TRUST COMPANY OF NEW YORK, WARBURG PARIBAS BECKER INCORPORATED, and WILLIAMS-MCWILLIAMS CO., INC.,

*Cross-Petitioners,*

—against—

GREAT LAKES INTERNATIONAL, INC.,

*Cross-Respondent.*

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION OF CROSS-RESPONDENT

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## Question Presented

Whether the record as a whole provides a sufficient basis for the constitutional standing requirement of injury in fact, fairly traceable to the challenged agency action, which is redressable by the requested relief.

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## BRIEF IN OPPOSITION OF CROSS-RESPONDENT

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### Statement of the Case

This brief is respectfully submitted in opposition to the cross-petition received on October 7, 1980. Cross-petitioners are the private respondents in Case No. 80-366. Cross-respondent respectfully refers the Court to the Statement of the Case in the petition in that case, at 2-8, for the facts and proceedings below. Cross-respondent does not claim that the district court made any finding of fact or conclusion of law on the issue of injury in fact. It does maintain that, based on the record, the district court properly assumed the truth of cross-respondent's allegations of injury. (Pet. at 16-17.)

## Summary of Argument

The alleged injury to cross-respondent is not speculative since cross-petitioners intend that the dredge will compete with cross-respondent, and is traceable to agency action, since the government conditionally approved a Title XI loan guarantee on the basis that the dredge would do so successfully. Moreover, the fact that contingencies must occur before injuries result does not make the injury speculative.

Cross-respondent's injury is redressable in this action since the record shows that the relief sought would in all likelihood terminate cross-petitioners' efforts to compete with cross-respondent in the domestic dredging industry.

## ARGUMENT

Cross-respondent, plaintiff below, has alleged that the agency action complained of herein will have the direct and immediate result of putting the non-citizens Stuyvesant and Boskalis in competition with petitioner in the domestic dredging industry, specifically in the market of Corps of Engineers' dredging contracts, causing incalculable economic injury to cross-respondent, and has supported its allegations by affidavit. (R.1, complaint, ¶¶ 4, 37, 50; R.3, Lemmerhirt affidavit, ¶ 16). Although cross-petitioners now contend, by way of argument of counsel, that their competition with cross-respondent is "speculative," they specifically identified cross-respondent's vessel, "Manhattan Island," as their principal competition. (Ex. 1 to R.1, National application, at 21-24.) The government conditionally approved National's request for a $30,000,000 guarantee upon finding that the dredge would in fact compete successfully with cross-respondent for Corps of Engineers' con-

tracts. (R.29, Neumann affidavit, Attachment 31, at 8-14.) None of the affidavits submitted by cross-petitioners or the government controverts cross-respondent's allegations of economic injury.

The fact that there are contingencies which must occur before the injury is done does not make that injury speculative. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261-262 (1977); *Rental Housing Ass'n of Greater Lynn, Inc.* v. *Hills*, 548 F.2d 388, 389 (1st Cir. 1977). Indeed, cross-petitioners claim that such "contingencies" are certain to occur. (Br. Opp. at 22.) Moreover, the fact that the dredge is now under construction gives this controversy the non-speculative character required by Article III, Section 2, of the Constitution. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 100 S.Ct. 800, 806 (1980); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra*, 429 U.S. at 262-63.

Cross-petitioners' counsel now argue that ". . . no injunction issued in this case would prevent the completion of construction or the eventual operation of this dredger in the domestic coastwise trade. . . ." (Br. Opp. at 22.) No such proposition is supported in the record, which includes moving affidavits submitted to the district court by cross-petitioners, asserting a substantial likelihood that the injunction sought herein would put an end to their project. (R.17, Brown affidavit, ¶ 17; R.19, Waldorf affidavit, ¶ 8; R.18, Brunner affidavit, ¶ 7.) *See Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 75 n.20 (1978).

Cross-petitioners urge that they might rearrange the participation of parties so as to remove the illegality alleged on the merits. (Br. Opp. at 22.) A mere cosmetic change in the identity of certain parties would not remove

the illegality asserted, and thus would not remove the alleged injury of illegal competition by the non-citizens, Stuyvesant and Boskalis. *Meacham Corp.* v. *United States*, 207 F.2d 535 (4th Cir. 1953), *cert. dismissed*, 348 U.S. 801 (1954). Counsel's argument, that possible action by the cross-petitioners might supplant the interests of the non-citizens with interests of citizens, is outside the record, and contradicted by cross-petitioners' affidavits. (*See, e.g.*, R.17, Brown affidavit, ¶ 17.) In any event, the fact that some voluntary unilateral action by cross-petitioners might provide cross-respondent with all its requested relief (*i.e.*, exclusion of foreign competition from the domestic dredging industry) does not detract from the necessity for such relief by court order until and unless such action be taken.

Based on the record as a whole, it is respectfully submitted that the district court correctly assumed the truth of cross-respondent's allegations of injury in fact, and that that constitutional requirement was no bar to the present action. Any remaining issues with respect thereto may be more properly determined in the district court. The court of appeals did not reach the constitutional standing issue. Cross-respondent respectfully maintains that the only question raised by the disposition in the courts below is their application of the "zone of interests" criterion for standing.

## CONCLUSION

The supposed issues raised by the cross-petition are unsupported by the record, are frivolous, and do not deserve the consideration of this Court. The cross-petition for a writ of certiorari should be in all respects denied.

Respectfully submitted,

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